No. 3664

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN BACIGALUPI,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

NATHAN C. COGHLAN,
Attorney for Plaintiff in Error.

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Statement of the Case.

The plaintiff in error and one Martin McGowan were jointly indicted for an alleged violation of the act of December 17th, 1914, relating to, generally speaking, narcotics, as amended February 24th, 1919. The indictment contained four (4) counts. The defendants were tried together. Martin McGowan was found not guilty, and the plaintiff in error was found guilty as charged, on all of the four (4) counts. A demurrer had theretofore been interposed to each of the counts of the indictment, and solely upon the points raised by this demurrer plaintiff in error comes into this Court.

Each of the four (4) counts of the indictment herein referred to charge the violation of the act in question and in each of said counts it is stated in terms that at the time of said violation of said act the defendants were "Persons required to register under the terms of said act".

In the first count the defendants were charged with the unlawful possession, with intent to sell, of certain narcotics, they not "having registered with the Collector of Internal Revenue"—and not "having paid the special tax required by the provisions of said act".

In the second count it is charged that "Being persons required to register under the terms of said act" they unlawfully had in their possession, with intent to sell, certain other narcotics, "without having registered with the Collector of Internal Revenue and without having paid the special tax required by the provision of said act".

In the third count it is charged that they "Being persons required to register under the terms of said act", sold, etc., narcotics, "not then and there in original stamped packages, nor * * * taken from original stamped packages".

In the fourth count it is alleged that "Being persons required to register under the terms of said act", they unlawfully sold, etc., certain narcotics, "not then and there in original stamped packages", and "not taken from original stamped packages" (pp. 2, 3, 4, 5, 6, Trans.).

The indictment, the demurrer and the minutes affecting them practically constitute the whole record in this case.

Specifications of Error.

The errors claimed by plaintiff in error may be briefly specified as follows:

The Court erred in overruling the demurrer to the indictment as to each of the counts therein contained, because

1. It cannot be ascertained therefrom whether the defendants were persons required to register under the terms of the act in question.

2. It cannot be ascertained therefrom whether the persons therein named are charged with the duty of registration, as provided in the act, by reason of their being producers, importers, manufacturers, compounders, dealers, dispensers, sellers, distributors or donors of the drugs or derivatives thereof mentioned in the said two first counts.

3. That the indictment does not state facts sufficient to constitute any offense against the laws of the United States.

Argument.

That portion of the Act of Congress out of which the charges in this case arose which authorizes the matter set forth in the first and second counts of the indictment, reads as follows:

> "It shall be unlawful for *any person not registered under the provisions of this act,* and *who has not paid the special tax provided for by this act,* to have in his possession or under his control any of the aforesaid drugs" (U. S. Comp. Sta. 1918, p. 998, Compact Edition).

The third and fourth counts find their sanction in the language of the amendment to the act, of date February 24, 1919, which reads:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package" (p. 124, 1919 Sup. to U. S. Comp. Sta., Compact Edition).

The act of which the foregoing quotations are a part declares that,

> "On or before July 1 of each year every person *who imports, manufactures, produces, compounds, sells, deals in, dispenses,* or *gives away* opium, etc., *shall register* with the collector of internal revenue of his district his *name* or *style, place of business* and *place* or *places where such business is* to be *carried on,* and pay the special tax as hereinafter provided" (see p. 124, 1919 Sup. to U. S. Comp. Sta., Compact Ed.).

The act in question, it will be remembered, is not a police regulation. It is a revenue measure. The "persons" who may be punished under the statute are only such "persons" as are described therein, to-wit: persons who import, manufacture, sell, deal in, dispense, or give away opium, etc.

It is not alleged in the indictment or in any of its counts that plaintiff in error belongs to any of the enumerated classes of "persons". The pleader has merely in general terms stated a conclusion of law. He has alleged that plaintiff in error was a person "required to register under the terms of the act". This is, of course, patently insufficient. It will not be contended that without proof as to the particular class to which the person charged may belong a verdict would stand; for it is only upon such proof that a jury could find that he was such a person as under the law is required to register.

It needs no citation of authority, of course, to support the general rule that *facts,* and not conclusions, must be averred in an indictment, yet, drawing at haphazard from the body of American Law, it may not be amiss to cite the case of State v. Graham, 38 Ark. 319, and Rank v. People, 80 Ill. 40, in which latter case it is held that an averment that defendant threatened to accuse a person of a misdemeanor was an averment of a mere conclusion of law. And, passing to another jurisdiction, it is held in State v. Record, 56 Ind. 107, that in an indictment against a clerk of a circuit court for failure to pay over funds collected by him, an allegation that such funds are "due and owing to the state of Indiana" cannot supply the place of allegations as to when such funds were collected.

But it is not alone upon this general principle that plaintiff in error need rely.

It is the law that where an offense may be committed *by persons of a certain description only,* defendant must be shown to have been of that description at the time of the act (U. S. v. McCormick, 28 Fed. Cas. No. 16663, 1 Branch, C. C. 593). It is, we think, clear that the mere words "being a person required to register under the act" do not show the defendant in this case to have belonged to any of the classes of "persons of a certain description" referred to in the act here under consideration. That this rule obtains in practically every jurisdiction is manifest from the following:

When the act as to which the offense is predicated is not in itself unlawful, but becomes so by reason of other facts connected with it, such facts must be alleged (Cearfoss v. State, 42 Md. 403; Com. v. Beerblower, 3 Pa. L. J. Rep. 404, 5 Pa. 426; Com. v. Clarke, 2 Ashn. (Pa.) 405; Pearce v. State, 1 Sneed (Tenn.) 63, 60 Am. Dec. 135). An indictment for refusal to obey a subpoena must show the authority under which it was issued (U. S. v. Cover, 46 Fed. 284). In indictments for official misconduct the holding of the office should be specifically charged (Shank v. State, 51 Miss. 464).

So when a statute enacts that anyone of a certain class of persons who shall do or omit a certain act and under certain circumstances shall be guilty of a crime, the indictment must describe the person indicted as one of that class and aver that he did or omitted the act under the circumstances making

it criminal (State v. Sloane, 67 N. C. 357). Where an indictment is based upon violation of a duty imposed against common right, it is necessary to state specifically the facts upon which such duty arises, unless it is imposed by a law or circumstances of which the Court will take judicial notice (State v. Middlesex etc. Traction Co. (N. J. Sup. 1901), 50 Atl. 354; State v. Haddon Field etc. Turnpike Co., 56 N. J. L. 97, 46 Atl. 700; State v. N. J. Turnpike Co., 16 N. J. L. 222; State v. Hageman, 13 N. J. L. 314; Rex v. Great Broughton, 5 Bluir 2700; Rex v. Holland, 5 T. R. 607; Rex v. Pendurray, 2 T. R. 513).

For example, where a corporation is indicted for failure to maintain a ferry, it must be shown how defendant under its charter became subject to the duty (State v. Wilmington etc. R. Co., 44 N. C. 243).

In the case of United States v. Woods (and five like cases), 224 Fed. Rep. 278 (Nos. 2645, 2647, 2661, 2663, 2664), the indictments charged that defendant

> "did willfully, knowingly, unlawfully and feloniously have in her possession and under her control * * * smoking opium * * * not having theretofore registered with the collector of internal revenue * * * as required under the provisions of the act of Congress of December 17, 1914, and not having theretofore paid the special tax provided for by said mentioned act."

General demurrers were interposed and the defendants maintained (1) that mere consumers of the drug and in possession of same only for their own consumption are not by the act required to register and pay the tax, and (2) that the *indictments do not show that defendants are of any of the classes* by the act required to register and pay the tax.

In sustaining the demurrers and dismissing the indictments, Bourquin, District Judge, said:

> "Having in mind that taxes can be imposed and statutory offenses created only by direct, clear and apt language, it seems clear that there is nothing in the act imposing the duty of registration and payment of taxes upon mere consumers of the drugs. They are not within section 1, and section 8 does not purport to extend the registration and taxation features of the act to them, or to any one, but only to make unlawful mere possession of the drugs by any person of the classes by section 1 required to register and pay, and who have not, and to create a statutory rule of evidence.
>
> "And this latter has misled the prosecution to believe that the essentials of the offense need not be set out in the indictments, but only this rule of evidence—the possession of the drugs, from which in some cases the offense may be inferred; that is, in the cases of those by section 1 required to register and pay the tax. Whenever an *offense can be committed by only certain classes of persons, the indictment must expressly allege that accused is of those classes or it is fatally defective* in substance; for lacking such allegation, all alleged may be true, and accused be innocent."

The rule laid down in the Woods case, supra, is followed in the case of United States v. Carney, 228 Fed. Rep. 163 (No. 1158), and the reasoning and language in this case seems to us peculiarly applicable in the case at bar. The indictment in the Carney case (omitting formal parts) charged:

> "That on or about the 15th day of September, 1915, at Mason City, Iowa, within the jurisdiction of this Court, the defendant did, knowingly and unlawfully, have in his possession a large quantity of morphine * * *. without having theretofore registered with the collector of internal revenue for the district of Iowa, his name and place of business, and paid said collector the special tax as provided and required by the Act of Congress approved December 17th, 1914, relating to the production * * * of opium * * *, contrary to the statute in such case made and provided."

The defendant demurred to the indictment upon the ground alone that it charged no offense, and in passing upon the demurrer the Court says:

> "The demurrer presents the single question: Does the indictment sufficiently charge the defendant with a violation of any of the provisions of the act? *It is not alleged that defendant was or had been engaged in any business that required him to register and pay the special tax as required by the act;* nor is anything alleged showing his possession of the tablets to be unlawful, save only the legal conclusion that defendant did 'knowingly and unlawfully' have in his possession the 140 tablets, each containing one-quarter grain of morphine.
>
> "It is axiomatic that statutes creating and defining crimes cannot be extended by impli-

cation or intendment, and before any one can be rightly punished under a statute creating an offense, the acts done by him must be plainly and unequivocally alleged to be within the offense as created (citing cases).

"It is also a cardinal rule of criminal pleading that an indictment for an offense must *allege directly* and with certainty *every essential element* or ingredient of the offense and *not by way of recital or inference;* that it is not sufficient to allege it in the words of the statute unless those words of themselves set forth clearly, fully, and with certainty every essential ingredient of which the offense consists * * * (In this case they have not even followed the words of the statute).

"With these principles in mind, the statute and indictment in question may be considered. Section 1 provides that on and after March 1st, 1915, every person who produces, imports, manufactures, deals in, dispenses, sells, distributes or gives away any of the drugs mentioned shall register with the proper revenue collector his name and place or places where such business is to be carried on, and pay to the person or persons who engage in dealing in or in some manner handling the drugs as a *part of his or their business* that are to register and pay the required tax, and persons or associations not so engaged are not within its terms. The act is highly penal in its nature and must be so construed as to include only those who are clearly within its terms. * * *"

This contention finds further support in the case of the United States v. Jin Fuey Moy, 241 U. S. 394, from the opinion in which case we quote, in part, as follows:

"The indictment charges a conspiracy with Willie Martin to have in Martin's possession opium. * * * It alleges that Martin was not registered with the collector of internal revenue of the district, and had not paid the special tax required. * * * The question is whether the possession conspired for is within the prohibitions of the act. (Then follow a recital of the provisions of the act.)

"The district judge considered that the act was a revenue act, and that the general words, 'any person', must be confined to the *class of persons* with whom the act previously had been purporting to deal. The government, on the other hand, contends that this act was passed with two others in order to carry out the international opium convention (38 Stat. at L. 1929); that Congress gave it the appearance of a taxing measure in order to give it a coating of constitutionality, but that it really was a police measure that strained all the powers of the legislature, and that Sec. 8 means all that it says, taking its words in their plain literal sense.

"A statute must be construed, if fairly possible so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. *If we could know judicially* that no opium is produced in the United States, the difficulties in this case would be less; but we hardly are warranted in that assumption when the *act itself purports to deal with those who produce it.* Congress, at all events, contemplated production in the United States, and therefore the act must be construed on the hypothesis that it takes place. If opium is produced in any of the states, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime. * * *

> "Approaching the issue from this point of view we conclude that 'any person not registered' in Par. 8 cannot be taken to mean any person in the United States, but must be taken to refer to the *class with which the statute undertakes to deal,*—the persons who are required to register by Section 1."

The judgment of the District Court, 225 Fed. 1003, quashing the indictment, was affirmed.

Plaintiff in error contends that from the foregoing decisions there can be only one interpretation of the law relating to narcotics so far as it affects this case, and that interpretation, beyond question, supports the contention here made that the indictment was in no way legally sufficient to overcome the objections herein made by demurrer. Manifestly, it is but a conclusion, which can only be drawn from averment and proof of the fact that the defendant is a member of one of the several classes referred to in the statute, that he was a person "required to register under the terms of the act". And it is obvious that if it still be the rule that "the indictment must *expressly* allege" that the accused is one of the classes named, then certainly the order of the Court below overruling the demurrer ought not to stand.

Dated, San Francisco,
June 6, 1921.

Respectfully submitted,

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